OAH 8-1900-30855
Revisor R-4144

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Rules of the Department of Labor and Industry Governing the Adoption of the International Residential Code

REPORT OF THE ADMINISTRATIVE LAW JUDGE

This matter came before Administrative Law Judge Eric L. Lipman for a rulemaking hearing on December 12, 2013. The public hearing was held in the Minnesota Room of the Minnesota Department of Labor and Industry's central office in Saint Paul, Minnesota.

The Minnesota Department of Labor and Industry (DLI or the Department) proposes to revise the Minnesota Residential Code, which is found in Chapter 1309 of *Minnesota Rules*. The Department's regulatory purpose is to update the Minnesota Residential Code to reflect changes made to the Model International Residential Code (IRC) by the International Code Council in 2009 and 2012.[1]

The rulemaking hearing and this Report are part of a larger rulemaking process under the Minnesota Administrative Procedure Act.[2] The Minnesota Legislature has designed this process so as to ensure that state agencies have met all of the requirements that the state has specified for adopting rules.

The hearing was conducted so as to permit agency representatives and the Administrative Law Judge to hear public comment regarding the impact of the proposed rules and what changes might be appropriate. Further, the hearing process provides the general public an opportunity to review, discuss and critique the proposed rules.

The agency must establish that the proposed rules are within the agency's statutory authority; that the rules are needed and reasonable; and that any modifications that the agency made after the proposed rules were initially published in the *State Register* are within the scope of the matter that was originally announced.[3]

Approximately 23 people attended the hearing and signed the hearing register. The proceedings continued until all interested persons, groups or associations had an

[1] *See,* HEARING TRANSCRIPT, at 26-30 and 33 (December 12, 2013).

[2] *See,* Minn. Stat. §§ 14.131 through 14.20.

[3] Minn. Stat. §§ 14.05, 14.131, 14.23 and 14.25.

opportunity to be heard concerning the proposed rules. Eighteen members of the public made statements or asked questions during the hearing.[4]

The agency panel at the public hearing included Jeffrey Lebowski (Counsel, Construction Codes and Licensing Division), Scott McLelland (Director of the Construction Codes and Licensing Division), Steven Hernick (Assistant Director, Construction Codes and Licensing Division), Wendy Legge (Chief General Counsel, DLI) and Richard Lockrem (Chairman, Chapter 1309 Advisory Committee).[5]

After the close of the hearing, the Administrative Law Judge kept the rulemaking record open for another 20 calendar days – until Thursday, January 2, 2014 – to permit interested persons and the Agency to submit written comments. Following the initial comment period, the hearing record was open an additional five business days so as to permit interested parties and the Agency an opportunity to reply to earlier-submitted comments.[6] The hearing record closed on Thursday, January 9, 2014.

SUMMARY OF CONCLUSIONS

The Department has established that it has the statutory authority to adopt the proposed rules, that it followed the required rulemaking procedures and that the proposed rules are needed and reasonable.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

I. Regulatory Background to the Proposed Rules

1. The 2012 Model IRC includes a wide-ranging series of changes to residential construction practice – regulating the features of residential structures from concrete foundation walls in a home's basement to the installation of corrosion-resistant flashing around the chimney.[7]

2. The most well-known of these provisions is the requirement that all new single-family dwellings, two-family dwellings, and townhouses be equipped with automatic fire sprinkler systems.[8]

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[4] HEARING ROSTER, at 1-3; HEARING TRANSCRIPT, at 3.

[5] HEARING TRANSCRIPT, at 17-18 and 25.

[6] *See,* Minn. Stat. § 14.15, subd. 1.

[7] *See,* Ex. A (Rule Draft 4144); Ex. B-1 (2012 IRC Model Code).

[8] *See,* Ex. L, Attachments 4, 5, 6, 8, 9, 10 and 65 (Development of the 2009 Model IRC); *see also,* Ex. L, Attachments 11, 29, 30, 31, 32, 33, 34, 35 and 36 (Materials Relating to Updates of Minnesota's Residential Code).

3. In this rulemaking, the Department proposes that all two-family dwellings and townhouses be equipped with automatic fire sprinkler systems as required in the most-recent model code. However, the Department proposes to amend the 2012 Model IRC so that only new single-family dwellings that are 4,500 square feet, or larger, would be required to be equipped with these systems.[9] As the Department reasons, the "most effective way to save lives, protect property and provide [] expected safety to fire fighters and first responders was through the installation of automatic fire sprinkler systems in new homes …."[10]

4. In the Department's view, these systems should be "in addition to the passive protection already afforded occupants by smoke alarms and gypsum board protection of light-weight floor designs."[11]

5. In both 2011 and 2012, the Minnesota Legislature approved measures that would have forbidden the Department from revising the State Building Code so as to require "the installation of fire sprinklers, any fire sprinkler system components, or automatic fire-extinguishing equipment or devices in any new or existing single-family detached dwelling unit."[12]

6. Both measures were vetoed by Governor Dayton. In his veto message to members of the Minnesota Legislature in May of 2012, Governor Dayton wrote:

> Installation of fire suppression sprinklers is required by the International Residential Building Code, which is currently being considered for adoption in Minnesota. Objections to its requirements would be best considered through the regular code adoption process, which is now underway. This process allows adequate notice, time for fact gathering, and a public hearing. Commissioner of Labor and Industry Ken Peterson is committed to ensuring that the code adoption process is fair. He has pledged to consider carefully all sides of the issue before making a final decision.
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> As I stated in my veto message last year, I take very seriously the concerns which fire safety professionals have expressed about the safety of home residents, their properties, and the lives of the men and women who courageously risk their lives to fight those fires. They are concerned that newly built homes burn more quickly, and that more firefighters are injured when floors collapse during fires. They contend that, with sprinkler

[9] Ex. A, at 23-24.

[10] DEPARTMENT'S POST-HEARING COMMENTS, OAH 1900-30855, at 9 (December 31, 2013).

[11] *Id*.

[12] *See,* House File 460, 1st Engrossment (2011); Senate File 1717, 4th Engrossment (2012); JOURNAL OF THE HOUSE, at 4669 (May 19, 2011); JOURNAL OF THE SENATE, at 6993 (May 3, 2012)

systems in place, fires could be more readily contained, resulting in fewer injuries and deaths to homeowners and firefighters.[13]

II. Rulemaking Authority

7. The Department cites Minn. Stat. §§ 326B.02, 326B.101 and 326B.106 as its sources of statutory authority for these proposed rules.[14]

8. These statutes provide in relevant part:

> (**Minn. Stat. § 326B.02, subd. 5**) (General rulemaking authority) The commissioner [of labor and industry] may, under the rulemaking provisions of chapter 14 and as otherwise provided by this chapter, adopt, amend, suspend, and repeal rules relating to the commissioner's responsibilities under this chapter, except for rules for which the rulemaking authority is expressly transferred to the Plumbing Board, the Board of Electricity, or the Board of High Pressure Piping Systems.
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> (**Minn. Stat. § 326B.101**) (Policy and Purpose) The State Building Code governs the construction, reconstruction, alteration, repair, and use of buildings and other structures to which the code is applicable. The commissioner shall administer and amend a state code of building construction which will provide basic and uniform performance standards, establish reasonable safeguards for health, safety, welfare, comfort, and security of the residents of this state and provide for the use of modern methods, devices, materials, and techniques which will in part tend to lower construction costs. The construction of buildings should be permitted at the least possible cost consistent with recognized standards of health and safety.
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> (**Minn. Stat. § 326B.106, subd. 1**) (Adoption of code) Subject to sections 326B.101 to 326B.194, the commissioner shall by rule and in consultation with the Construction Codes Advisory Council establish a code of standards for the construction, reconstruction, alteration, and repair of buildings, governing matters of structural materials, design and construction, fire protection, health, sanitation, and safety, including design and construction standards regarding heat loss control, illumination, and climate control. The code must also include duties and responsibilities for code administration, including procedures for administrative action, penalties, and suspension and revocation of certification. The code must conform insofar as practicable to model building codes generally accepted and in use throughout the United States, including a code for building conservation. In the preparation of

[13] *See,* Ex. L, Attachment 3; JOURNAL OF THE SENATE, at 7130 (May 7, 2012); *see also,* JOURNAL OF THE HOUSE, at 5330-31 (May 25, 2011).

[14] Ex. B, at 2-3 (Statement of Need and Reasonableness or SONAR).

> the code, consideration must be given to the existing statewide specialty codes presently in use in the state. Model codes with necessary modifications and statewide specialty codes may be adopted by reference. The code must be based on the application of scientific principles, approved tests, and professional judgment. To the extent possible, the code must be adopted in terms of desired results instead of the means of achieving those results, avoiding wherever possible the incorporation of specifications of particular methods or materials. To that end the code must encourage the use of new methods and new materials. Except as otherwise provided in sections 326B.101 to 326B.194, the commissioner shall administer and enforce the provisions of those sections.[15]

9. At the public hearing, and in written comments, members of the Builder's Association of Minnesota (the Builders) questioned whether the Department's proposed automatic fire sprinkler rule was consistent with the delegations of rulemaking authority under Chapter 326B. The Builders asserted that the proposed fire sprinkler standard was beyond the authority of the Department to promulgate because it does not:

(a) adhere to "building codes generally accepted and in use throughout the United States;"[16]

(b) follow from the application of "scientific principles, approved tests or professional judgment;"[17]

(c) tend to lower construction costs;[18]

(d) represent the least-cost method of fire-safety protection for occupants of residential structures.[19]

Each of these contentions is addressed below.

A. Generally Accepted Building Codes and Filings

10. The Builder's Association of Minnesota (the Builders) asserts that the proposed sprinkler requirement is contrary to Minn. Stat. § 326B.106, because "the fire sprinkler mandate has been rejected in 41 states."[20]

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[15] Minn. Stat. §§ 326B.02, 326B.101 and 326B.106 (emphasis added).

[16] *See,* Ex. L, Pre-Hearing Memorandum, at 6-7.

[17] *Id.* at 6.

[18] *Id*.

[19] *Id*.

[20] *Compare,* Ex. L, Pre-Hearing Memorandum, at 6-7 with Minn. Stat. § 326B.106, subd. 1.

11. The requirement that the Minnesota Building Code "conform insofar as practicable to model building codes generally accepted and in use throughout the United States," does not require the Department to wait until a majority of states have approved a particular construction practice before including it in the Minnesota Building Code. Instead, Chapter 326B makes clear that the Commissioner of Labor and Industry, after consultation with the Construction Codes Advisory Council, may make the technical, scientific and policy judgments needed to assemble the Minnesota Building Code.[21]

12. The structure, ordering, numbering conventions and text of the proposed rule adhere closely to the structure, ordering, numbering conventions and text of the Model IRC.[22]

13. The Model IRC is a building code "generally accepted and in use throughout the United States."[23]

14. Any builder, contractor or inspector who was familiar with the contents of the model IRC Code would be able to access applicable building standards and regulatory provisions in Chapter 1309 of *Minnesota Rules.*[24]

15. The level of conformity required by Minn. Stat. § 326B.106, subd. 1, is achieved with the proposed rule.

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[21] *See,* Minn. Stat. § 326B.106, subd. 1 ("the commissioner shall by rule and in consultation with the Construction Codes Advisory Council establish a code of standards for the construction, reconstruction, alteration, and repair of buildings, governing matters of structural materials, design and construction, fire protection, health, sanitation, and safety .... In the preparation of the code, consideration must be given to the existing statewide specialty codes presently in use in the state. Model codes with necessary modifications and statewide specialty codes may be adopted by reference. The code must be based on the application of scientific principles, approved tests, and professional judgment"); *see also*, Minn. Stat. § 326B.101 ("The commissioner shall administer and amend a state code of building construction which will provide basic and uniform performance standards, establish reasonable safeguards for health, safety, welfare, comfort, and security of the residents of this state and provide for the use of modern methods, devices, materials, and techniques."); HEARING TRANSCRIPT*,* at 44 (Testimony of Roger Axel) ("There [are] no requirements that any state must adopt the 2009 IRC completely as it's written. They can go through the entire document and determine based on previous editions whether they want to incorporate a provision or not. I think that is an important point to understand in regards to the Residential Code").

[22] *See,* Ex. B-1.

[23] *See, e.g.,* HEARING TRANSCRIPT*,* at 26 and 247; Ex. L, Attachment 13; Minn. R. 1309.0010, subp. 1 ("The 2006 edition of the International Residential Code (IRC) as promulgated by the International Code Council, Falls Church, Virginia, is incorporated by reference and made part of the Minnesota State Building Code except as qualified by the applicable provisions in Minnesota Rules, chapter 1300, and as amended in this chapter. The IRC is not subject to frequent change and a copy of the IRC, with amendments for use in Minnesota, is available in the office of the commissioner of labor and industry.").

[24] *Compare* Ex. B-1 with Minn. R. Ch. 1309; *see also,* Minn. R. 1309.0010, subp. 1.

B. Application of Scientific, Technical and Professional Judgment

16. The Builders assert that the proposed sprinkler requirement is contrary to Minn. Stat. § 326B.106, subd. 1, because "DLI cannot show, through scientific principles, approved tests … or professional judgment, that the proposed rules would increase life-safety, because new single-family homes in Minnesota are already very safe."[25]

17. During its deliberations, the Advisory Committee on the Revision of Chapter 1309 received and reviewed a wide-range of scientific, technical and cost reports on automated fire sprinkler systems.[26]

18. The materials received by the Advisory Committee were shared with the public by way of a DLI-hosted webpage on Chapter 1309.[27]

19. While reasonable people can disagree with the Commissioner's conclusion that "there is increased life-safety and property protection with automatic fire sprinkler systems," the Commissioner's determination is not unrelated to "scientific principles, approved tests and professional judgment."[28]

20. The technical and professional assessment required by Minn. Stat. § 326B.106, subd. 1 was completed in this proceeding.

C. Tending to Lower Construction Costs

21. The Builders assert that the proposed sprinkler requirement is contrary to Minn. Stat. § 326B.101, because "the proposed rules do not 'tend to lower construction costs.'" Pointing to both the Department's projected cost impacts, and the estimates that it submitted into the record, the Builders maintain that the proposed rule will significantly and negatively impact the construction costs for single-family homes. As

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[25] *Compare,* Ex. L, Pre-Hearing Memorandum, at 6 with Minn. Stat. § 326B.106, subd. 1.

[26] Ex. B, at 27-31 (SONAR). Among the materials that were received by the Advisory Committee were: *Benefit-Cost Analysis of Residential Fire Sprinkler Systems* (September 2007); *CDC Report - Preventing Injuries and Deaths of Fire Fighters Due to Truss System Failures*; *Equivalent Performance Through Testing of Unprotected Floor Assemblies* (Aug. 23, 2010); *Fire Protection Research Foundation - Home Fire Sprinkler Cost Assessment* (September 2013); *Minnesota State Fire Chiefs Association - White Paper on Residential Sprinkler Systems*; *National Institute of Standards and Technology - The Economic Consequence of Firefighter Injuries and Their Prevention* (August 2004); *Tyco Fire Suppression and Building Products - Performance of Composite Wood Joists Under Realistic Fire Conditions* (2008); *U.S. Experience with Sprinklers and Other Fire Extinguishing Equipment* (January 2009); *Underwriters Laboratories - Structural Stability of Engineered Lumber in Fire Conditions* (January 2009).

[27] *See,* Ex. B, at 27-28 (SONAR); "1309 Publications" Posted to the DLI Webpage (http://www.dli.state.mn.us/CCLD/rm/1309pub.asp).

[28] *Compare,* Ex. B, at 31 (SONAR) and "1309 Publications" with Minn. Stat. § 326B.106, subd. 1; *see also,* Minn. R. 1300.0030 (The Minnesota Building Code has among its purposes to promulgate construction standards that "provide safety to firefighters and emergency responders during emergency operations").

the Builders maintain, "fire sprinklers are expensive and homeowners will likely never recover the costs associated with installation."[29]

22. The policy and purpose statement of Minn. Stat. § 326B.101 includes a legislative prediction. In this statute, the Legislature forecasts that if Minnesota's Building Code includes "basic and uniform performance standards" and provides "for the use of modern methods, devices, materials, and techniques" the result "will in part tend to lower construction costs."[30]

23. This forecast is not, however, a substantive limitation upon the Department's authority to revise the Building Code. It does not prevent the Department from adopting revisions to building standards if the new practices are more costly than those that they replace. Instead, the Legislature predicts that by establishing common and familiar construction standards for Minnesota, our state will create economies of scale that "will in part tend to lower construction costs" over what would be if there was no uniform standard.

24. The hearing record in this proceeding confirms the Legislature's prediction. There is evidence that following the establishment of new construction standards, the costs associated with implementing those standards are subject to competition and, over time, tend to drop.[31]

25. The Department is not barred by Minn. Stat. § 326B.101 from promulgating a building construction standard that is more costly than the one it replaces.

D. Lower Cost Methods of Fire-Safety Protection

26. The Builders assert that the proposed sprinkler requirement is contrary to Minn. Stat. § 326B.101, because the statute provides that "[t]he construction of buildings should be permitted at the least possible cost consistent with recognized standards of health and safety." As noted above, the Builders maintain that the proposed rule will significantly and negatively impact the construction costs for single-family homes.[32]

27. Minn. Stat. § 326B.101 includes a recommendation from the Legislature to the Building Code development teams within the Department. When setting forth its purposes for Chapter 326B, the Legislature urged agency rule writers to the balance health and safety benefits of future construction standards against the costs of adhering

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[29] *See,* Ex. B at 32-33 and Ex. L, Pre-Hearing Memorandum, at 6 and 11 and Attachments 45, 46, 47, 48 and 50.

[30] Minn. Stat. § 326B.101.

[31] *See,* Ex. B-5 at iv, 19 and 20; Ex. B-6 at 9 and 10; DEPARTMENT'S POST-HEARING REBUTTAL COMMENTS, OAH 1900-30855, at 12 (January 9, 2014).

[32] *See,* Ex. L, Pre-Hearing Memorandum, at 6 and 11.

to any new practices. In this rulemaking, the Department has undertaken the balancing contemplated by the statute; particularly when it announces that the "most effective way to save lives, protect property and provide [] expected safety to fire fighters and first responders was through the installation of automatic fire sprinkler systems in new homes …."[33]

28. Likewise important, the Legislature's admonition that "[t]he construction of buildings *should* be permitted at the least possible cost," is not a requirement that the Code only include those provisions which result in the "least possible cost." The term "should" – like "may" – signals that the instruction is permissive and not a command.[34]

29. The Department is not barred by Minn. Stat. § 326B.101 from promulgating a particular construction standard because another practice is less costly.

E. Conclusion

30. The Commissioner's authority to promulgate administrative rules relating to building and construction standards is very broad. Minn. Stat. § 326B.02, subd. 5 provides that the Commissioner may promulgate administrative rules that "adopt, amend, suspend, [or] repeal" sections of the Building Code so long as he follows the rulemaking procedures in Chapter 14 and the underlying rules "relat[e] to the Commissioner's responsibilities" under Chapter 326B.[35]

31. The proposed rules are logically related to the Commissioner's responsibilities under Chapter 326B.

32. The Administrative Law Judge concludes that the Department has the statutory authority to adopt the proposed rules.

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[33] DEPARTMENT'S POST-HEARING COMMENTS, OAH 1900-30855, at 9 (December 31, 2013).

[34] *See, In re Jacobs*, 802 N.W.2d 748, 754 (Minn. 2011) ("But the use of the word 'should' indicates that the comment is not mandatory. 'Where a Rule contains a permissive term, such as 'may' or 'should,' the conduct being addressed is committed to the personal and professional discretion of the [person in question.'") (citation omitted); *see also,* Minn. Stat. § 645.44, subd. 15 (use of the term "may" in a statute is permissive); *Forbes v. Town of Sw. Harbor*, 763 A.2d 1183, 1186 (Me. 2001) ("We stated in a recent case that the use of the term 'should' is permissive"); *Fowler v. Williams Cty. Commrs.*, 682 N.E.2d 20, 28 (Ohio 1996) ("The use of the term 'should' is permissive").

[35] Ex. C; 37 *State Register* 712 (November 5, 2012).

III. Procedural Requirements of Chapter 14

A. Publication and Filings

33. On November 5, 2012, the Department published in the *State Register* a Request for Comments seeking comments on possible amendments to the state's building code.[36]

34. On August 1, 2013, Chief Administrative Law Judge Tammy L. Pust granted leave to the Department, pursuant to Minn. Stat. § 14.14, subd. 1 (b), to omit the text of the proposed revisions in this matter when publishing hearing-related notices in the *State Register*.[37]

35. On October 16, 2013, the Department filed documents with the Office of Administrative Hearings seeking review and approval of its Notice of Hearing and its additional notice plan. By way of an Order dated October 22, 2013, the Notice and additional notice plan were approved.[38]

36. On October 28, 2013, the Department mailed a copy of the SONAR to the Legislative Reference Library as directed by Minn. Stat. §§ 14.131 and 14.23.[39]

37. The Notice of Hearing, published in the October 28, 2013 edition of the *State Register*, set Thursday, December 12, 2013 as the date for the hearing.[40]

38. On October 28, 2013, the Department mailed a copy of the Notice of Hearing to all persons and associations who registered their names with the Department for the purpose of receiving such notice. On October 28, 2013, the Department sent Electronic notices to the persons and associations identified in the additional notice plan.[41]

39. On October 28, 2013, the Department mailed a copy of the Dual Notice and the Statement of Need and Reasonableness (SONAR) to the chairs and ranking minority party members of the legislative policy and budget committees with jurisdiction over construction codes and licensing.[42]

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[36] *See,* Minn. Stat. § 326B.02, subd. 5 with *Anderson v. Commissioner of Highways*, 126 N.W.2d 778, 780-81 (Minn. 1964) ("The modern tendency is to be more liberal in permitting grants of discretion to administrative officers in order to facilitate the administration of laws as the complexity of economic and governmental conditions increase").

[37] Ex. J.

[38] Ex. E.

[39] Ex. D.

[40] Ex. E.

[41] Exs. F-1 through F-3; *see also,* Ex. B at 7 (SONAR).

[42] Ex. G; *see also,* Ex. B at 7 (SONAR).

40. At the hearing on December 12, 2013, the Department filed copies of the documents required by Minn. R. 1400.2220.[43]

B. Additional Notice Requirements

41. Minn. Stat. §§ 14.131 and 14.23 requires that an agency include in its SONAR a description of its efforts to provide additional notification to persons or classes of persons who may be affected by the proposed rule; or alternatively, the agency must detail why these notification efforts were not made.

42. On October 16, 2013, the Department provided the Notice of Hearing in the following manner, according to the Additional Notice Plan approved by the Office of Administrative Hearings:

- Notice of the rulemaking hearing was posted on the Department's website and the Department has maintained these materials continuously since they were posted.

- Notice of the rulemaking was sent by first class mail to the notice list the Department maintains pursuant to Minn. Stat. § 14.14.

- A copy of the Notice of Hearing was sent to a wide-ranging set of construction trade associations, fire safety organizations and local government officials, as detailed in its Additional Notice Plan.[44]

C. Notice Practice

43. The Administrative Law Judge finds that the Department fulfilled its responsibilities, under Minn. R. 1400.2080, subpart 6, to mail the Notice of Hearing "at least 30 days before the start of the hearing" to potential stakeholders.[45]

44. The Administrative Law Judge finds that the Department fulfilled its responsibilities to mail the Dual Notice "at least 30 days before the start of the hearing" to designated legislators.[46]

45. The Administrative Law Judge concludes that the Department fulfilled its responsibilities as to mailing the Notice of the Hearing.[47]

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[43] *Compare,* Exs. A through J with Minn. R. 1400.2220, subp. 1.

[44] Ex. B, at 7; Ex. E; Exs. F-1 through F-3.

[45] Ex. E; Exs. F-1 through F-3.

[46] *See,* Minn. Stat. §§ 14.14 and 14.116; Ex. G.

[47] Minn. Stat. § 14.14.

D. Impact on Farming Operations

46. Minn. Stat. § 14.111 imposes additional notice requirements when the proposed rules affect farming operations. The statute requires that an agency provide a copy of any such changes to the Commissioner of Agriculture at least 30 days prior to publishing the proposed rules in the *State Register*.[48]

47. The proposed rules do not impose restrictions or have an impact on farming operations. The Administrative Law Judge finds that the Department was not required to notify the Commissioner of Agriculture.[49]

E. Statutory Requirements for the SONAR

48. The Administrative Procedure Act obliges an agency adopting rules to address eight factors in its Statement of Need and Reasonableness (SONAR). Those factors are:

(a) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;

(b) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;

(c) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;

(d) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;

(e) the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals;

(f) the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals;

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[48] Minn. Stat. § 14.111.

[49] Ex. B, at 7; *see also,* Ex. A.

(g) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference; and

(h) an assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule.[50]

1. The Agency's Regulatory Analysis

(a) A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.

49. The Department asserts that the classes of affected persons who will be affected by the proposed rule include residential building contractors and builders, designers, certified building officials, materials manufacturers, fire service personnel, and homeowners.[51]

50. The Department further predicts that these same groups will benefit from the proposed rule – presumably on the grounds that greater (albeit not complete) conformity with the 2012 IRC avoids confusion as to the building practice that should apply when constructing residential structures.[52]

51. The Department projects that those who will bear the costs of the proposed rule include residential building contractors and builders, in the short term, although these costs will be passed on to homebuyers in the form higher prices for newly constructed homes.[53]

(b) The probable costs to the Agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

52. The Department estimates that the costs of implementing the proposed rule to it, and to sister agencies, will be modest. These costs are associated with the purchase of updated versions of the Building Code book and educational expenses that

[50] Minn. Stat. § 14.131.

[51] Ex. B, at 3.

[52] *Id.* at 3 – 5.

[53] *Id.* at 3; *see also,* Minn. R. 1300.0030, subp. 1 ("The purpose of the code is not to create, establish, or designate a particular class or group of persons who will or should be especially protected or benefited by the terms of the code").

will be incurred training code enforcement personnel on the features of the new rule. The Department asserts that these costs are not significant.[54]

53. The Department does not predict that adoption or enforcement of the proposed rule will impact state revenues.[55]

(c) The determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.

54. The Department asserts that achieving greater conformity with the 2012 IRC "will result in more predictable code application and enforcement," and as a result "tend to lower costs by reducing the need for review by … entities responsible for code interpretation and review."[56]

(d) A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.

55. The Department maintains that because the IRC is a key source document for the Minnesota Residential Code and "is currently the only model residential building code that is generally accepted and in use in the United States," it did not consider any alternatives for promulgating revised standards for residential construction.[57]

(e) The probable costs of complying with the proposed rules.

56. While the Department asserts that the costs of complying with the proposed rule will vary across projects – because these costs will be "dependent upon a building's design, use, age, and condition" – it offers two general cost projections: The Department maintains that new homes which are 4,500 square feet or larger will incur additional construction costs of approximately $1.61 per square foot due to compliance with the automatic fire sprinkler mandate in the proposed rule. Moreover, the Department forecasts that (unless a specific exemption applies) new homes which are less than 4,500 square feet will incur "a cost of $0.27 to $0.30 per square foot to install Y2-inch gypsum board for fire protection of floors."[58]

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[54] Ex. B, at 4 and 5.

[55] *Id*. at 4.

[56] *Id.* at 4.

[57] *Id*. *See also,* Minn. R. 1309.0010, Minn. R. 1309.0020 and Minn. R. 1309.4300.

[58] Ex. B at 4 and 5; Ex. B-5; Ex. B-6; Ex. B-7.

(f) The probable costs or consequences of not adopting the proposed rule, including those costs borne by individual categories of affected parties, such as separate classes of governmental units, businesses, or individuals.

57. The Department notes that the existing rules, in Chapter 1309, are based upon the 2006 version of the IRC. It argues that the consequences of not adopting the proposed rules would result in "confusion with application and enforcement of an older code when a newer code is available." Moreover, it posits that equipment and materials called for in the 2006 IRC may become more difficult to obtain as later versions of the IRC are approved by other jurisdictions. It concludes that a "failure to update the residential code by not adopting the proposed rule would have a negative impact on the administration, safety, application and enforcement of Minnesota's residential building code provisions."[59]

(g) An assessment of any differences between the proposed rules and existing federal regulation and a specific analysis of the need for and reasonableness of each difference.

58. In the SONAR, the Department states flatly that there are no applicable federal regulations that address the addition of automatic fire sprinklers in residential construction.[60]

(h) An assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule.

59. In the SONAR, the Department observes that in this context, federal agencies who hope to influence the design features of structures and local construction practice are active in the triennial International Building Code revision process. Department staff members and Advisory Committee Members closely monitor the deliberations of the International Building Code committees and the revisions that are made to text of this Code. For examples of the monitoring, assessment and revisions to Minnesota's Code that occur so as to align with the federal practice, the Department points to the recent changes sought by federal agencies as to the accessibility and energy efficiency of residential structures.[61]

[59] Ex. B at 5.

[60] *Id*. at 6.

[61] *Id*.

60. By aligning Minnesota's building and construction practice with the International Building Code, the Department asserts that the cumulative effect of the regulations on building practices is "greatly reduced or eliminated."[62]

2. Performance-Based Regulation

61. The Administrative Procedure Act also requires an agency to describe how it has considered and implemented the legislative policy supporting performance based regulatory systems. A performance based rule is one that emphasizes superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.[63]

62. The Administrative Law Judge concludes that the rule development process implemented the policies set forth in Minn. Stat. § 14.002, because the proposed rules are expressed in "terms of desired results instead of the means of achieving those results" and avoid the "incorporation of specifications of particular methods or materials." Drafted in this way, the proposed rules "encourage the use of new methods and new materials" in building residential structures.[64]

3. Consultation with the Commissioner of Minnesota Management and Budget (MMB)

63. As required by Minn. Stat. § 14.131, the Commissioner of Minnesota Management and Budget (MMB) evaluated the fiscal impact of the proposed rules on local units of government. In a Memorandum dated October 3, 2013, MMB concluded that "there does not appear to be significant costs to the local units of government that are not recoverable through local fees as a result of this proposed rule."[65]

4. Critiques of the Agency's Minn. Stat. § 14.131 Analysis

64. In its prehearing submissions, the Builders argue that the Department failed to undertake the analysis required by Minn. Stat. § 14.131, because it did not seriously consider construction alternatives to sprinkler systems – particularly the benefits of adding one-half inch gypsum wallboard to increase the fire resistance of flooring in new homes.[66]

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[62] *Id*.

[63] Minn. Stat. § 14.002.

[64] *Compare* Ex. A with Minn. Stat. § 14.002 and Minn. Stat. § 326B.106, subd. 1 ("To the extent possible, the [Building] code must be adopted in terms of desired results instead of the means of achieving those results, avoiding wherever possible the incorporation of specifications of particular methods or materials. To that end the code must encourage the use of new methods and new materials.").

[65] Ex. H.

[66] Ex. L, Pre-Hearing Memorandum, at 7, 8 and 11 and Attachment 13 (Effect of Unfloor Protection on Collapse Time Table).

65. As made clear by the text of Minn. Stat. § 14.131, the agency must "ascertain … information" relating to the listed inquiries and make a "reasonable effort" to complete the needed assessments.

66. The Department did not spend much time or resources on developing alternatives for "achieving the purpose of the proposed rule;" because, in this instance, the regulatory purpose was to revise the existing Code. There are essentially two options for achieving that particular purpose – the Department can undertake a subsequent rulemaking or seek to change the underlying state statutes. Here, Governor Dayton and the Department preferred to develop a rulemaking record and to reach a decision by way of the processes in Chapter 14.[67]

67. As to the substance of the proposed rule, the Department did carefully review the fire-retarding properties of gypsum wallboard and its cost advantages. In the end, however, the Department concluded that with respect to larger homes:

> there is increased life-safety and property protection with automatic fire sprinkler systems as demonstrated by occupants having sufficient time to escape, by providing additional structural protection for first responders, and by limiting the extent of structural damage.[68]

68. The Department obtained information for assessing revisions to the IRC, including alternatives to an automatic fire sprinkler requirement. It made reasonable efforts to complete the required assessments.[69]

69. Mark Bruner, President of the Manufactured and Modular Home Association of Minnesota argues that the SONAR analysis is deficient because it does not assess the parallel fire protection requirements imposed upon manufactured homes under Title 24 of the Code of Federal Regulations.[70]

70. While the materials that make up a manufactured home must meet a demanding set of fire protections standards, in the view of the Administrative Law Judge, the fact that these requirements apply to a subset of Minnesota's construction industry does not render the Department's analysis of the broader rules unreasonable. Importantly, the only mention of automated fire sprinkler systems within Title 24 of the Code of Federal Regulations emphasizes that the installation of such system is "as State or local law may require." Further, if the U.S. Department of Housing and Urban Development had promulgated a particular construction standard that related to fire sprinklers, the federal regulation would prevail. Thus, as to automatic fire sprinklers the

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[67] Ex. B at 4; *see also,* Ex. L, Attachment 3; Minn. Stat. § 326B.106, subd. 1.

[68] Ex. B at 30-31; *see also,* Ex. B at 4-5 and 32-33; Ex. B-8; DEPT'S POST-HEARING COMMENTS, at 9.

[69] *Id*.

[70] Ex. AB at 10; HEARING TRANSCRIPT, at 215.

regulatory requirements are as noted by the Department: There is a single applicable building standard. The Department's description was not unreasonable.[71]

5. Compliance with Minn. Stat. § 14.131

71. The Administrative Law Judge finds that the Department has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems, and the fiscal impact on units of local government.

6. Analysis of Impacts to Small Businesses and Cities

72. Minn. Stat. § 14.127, requires the Department to "determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed $25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees." The Department must make this determination before the close of the hearing record and the Administrative Law Judge must review the agency's conclusion.[72]

73. The Department argues that any compliance costs associated with the proposed rule may be avoided because no one in the construction industry is under an obligation to build a new home. The Department writes:

> Any small business or city contemplating new construction or remodeling will decide whether or not to undertake the construction or remodeling project and when that remodeling will occur. Because no new construction or remodeling is required by the proposed rules within the first year after the rules take effect, no new construction or remodeling need be undertaken within the first year.[73]

74. The Administrative Law Judge concurs in the determination that the compliance costs of the proposed rules do not exceed the thresholds set for in Minn. Stat. § 14.127, but for reasons other than that submitted by the Department.

75. The Department argues that the regulatory impacts of a proposed rule are zero if a regulated party is able to stop performing activities that are covered by the new regulation. Under this approach, the regulatory costs to home builders are zero – and will always be zero – because those companies are free to close. This is not a sensible

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[71] 24 C.F.R. § 982.605 ("A sprinkler system that protects all major spaces, hard wired smoke detectors, and such other fire and safety improvements as State or local law may require must be installed in each building"); 24 C.F.R. § 3280.1 ("This standard covers all equipment and installations in the design, construction, transportation, fire safety, plumbing, heat-producing and electrical systems of manufactured homes which are designed to be used as dwelling units"); HEARING TRANSCRIPT, at 218.

[72] Minn. Stat. § 14.127, subds. 1 and 2.

[73] Ex. B, at 8 (SONAR).

reading of Minn. Stat. § 14.127 and would render the assessments performed under that statute a nullity.

76. A key assumption of the requirement to calculate the "cost of complying with a proposed rule in the first year after the rule takes effect" is that persons covered by proposed regulations will continue the same type of activities as they had before the regulations took effect. The statute calls for a "before" and "after" cost comparison.

77. Following a searching review of the hearing record, there is not a basis to conclude that the "cost of complying with a proposed rule in the first year after the rule takes effect will exceed $25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees." This is no doubt true because the provisions regulating the construction of commercial and resort buildings are covered by a different set of building codes than the IRC. The hearing record simply does not point to small businesses or small cities purchasing new homes – and thus incurring the added expenses associated with the revised Code.[74]

78. The Administrative Law Judge finds that the Department has made the determinations required by Minn. Stat. § 14.127 and, for reasons other than those announced by the Department, approves those determinations.

7. Adoption or Amendment of Local Ordinances

79. Under Minn. Stat. § 14.128, the Department must determine if a local government will be required to adopt or amend an ordinance or other regulation to comply with a proposed agency rule. The Department must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.[75]

80. The Department concluded that no local government will need to adopt or amend an ordinance or other regulation to comply with the proposed rules. The Agency's proposed rule should not require local governments to adopt or amend those more general ordinances and regulations.[76]

81. The Administrative Law Judge finds that the Department has made the determination required by Minn. Stat. § 14.128 and approves that determination.

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[74] *See,* DEPT'S POST-HEARING COMMENTS, at 14-15; Minn. R. Ch. 1305; *see generally*, Ex. S (Comments of Brad Arnold, Senior Project Manager of Hy-Tec Construction) ("Implementing the sprinkler mandate would put a financial hardship on our residential clients contemplating construction"); Ex. T (Comments of Craig Whitney, President of the Fargo – Moorhead – West Fargo Chamber of Commerce) ("The residential fire sprinkler rule will be costly for consumers").

[75] Minn. Stat. § 14.128, subd. 1.

[76] Ex. B, at 8 (SONAR).

IV. Rulemaking Legal Standards

82. The Administrative Law Judge must make the following inquiries: Whether the agency has statutory authority to adopt the rule; whether the rule is unconstitutional or otherwise illegal; whether the agency has complied with the rule adoption procedures; whether the proposed rule grants undue discretion to government officials; whether the rule constitutes an undue delegation of authority to another entity; and whether the proposed language meets the definition of a rule.[77]

83. Under Minn. Stat. § 14.14, subd. 2, and Minn. R. 1400.2100, the agency must establish the need for, and reasonableness of, a proposed rule by an affirmative presentation of facts. In support of a rule, the agency may rely upon materials developed for the hearing record,[78] "legislative facts" (namely, general and well-established principles, that are not related to the specifics of a particular case, but which guide the development of law and policy),[79] and the agency's interpretation of related statutes.[80]

84. A proposed rule is reasonable if the agency can "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."[81] By contrast, a proposed rule will be deemed arbitrary and capricious where the agency's choice is based upon whim, devoid of articulated reasons or "represents its will and not its judgment." [82]

85. An important corollary to these standards is that when proposing new rules an agency is entitled to make choices between different possible regulatory approaches, so long as the alternative that is selected by the agency is a rational one.[83] Thus, while reasonable minds might differ as to whether one or another particular approach represents "the best alternative," the agency's selection will be approved if it is one that a rational person could have made.[84]

86. Because the Department proposed further changes to the rule language after the date the Notice of Hearing was published in the *State Register*, it is also necessary for the Administrative Law Judge to determine if this new language is

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[77] *See,* Minn. R. 1400.2100.

[78] *See, Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 240 (Minn. 1984); *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. Ct. App. 1991).

[79] *Compare generally, United States* v. *Gould,* 536 F.2d 216, 220 (8th Cir. 1976).

[80] *See, Mammenga v. Agency of Human Services*, 442 N.W.2d 786, 789-92 (Minn. 1989); *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).

[81] *Manufactured Hous. Inst.*, 347 N.W.2d at 244.

[82] *See, Mammenga*, 442 N.W.2d at 789; *St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm'n*; 251 N.W.2d 350, 357-58 (1977).

[83] *Peterson v. Minn. Dep't of Labor & Indus*., 591 N.W.2d 76, 78 (Minn. Ct. App. 1999).

[84] *Minnesota Chamber of Commerce*, 469 N.W.2d at 103.

substantially different from that which was originally proposed. The standards to determine whether any changes to proposed rules create a substantially different rule are found in Minn. Stat. § 14.05, subd. 2. The statute specifies that a modification does not make a proposed rule substantially different if:

- "the differences are within the scope of the matter announced . . . in the notice of hearing and are in character with the issues raised in that notice"

- the differences "are a logical outgrowth of the contents of the . . . notice of hearing, and the comments submitted in response to the notice" and

- the notice of hearing "provided fair warning that the outcome of that rulemaking proceeding could be the rule in question."

87. In reaching a determination regarding whether modifications result in a rule that is substantially different, the Administrative Law Judge is to consider:

- whether "persons who will be affected by the rule should have understood that the rulemaking proceeding . . . could affect their interests;"

- whether the "subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the . . . notice of hearing;" and

- whether "the effects of the rule differ from the effects of the proposed rule contained in the . . . notice of hearing."

V. Rule by Rule Analysis

88. As noted above, the role of the Administrative Law Judge during a legal review of rules is to determine whether the Department has made a reasonable selection among the regulatory options that it has available. The judge does not fashion requirements that the judge regards as best suited for the regulatory purpose. This is because the delegation of rulemaking authority is drawn from the Minnesota Legislature and is conferred by the Legislature upon the agency. The legal review under the Administrative Procedure Act begins with this important premise.[85]

89. Several sections of the proposed rules were not opposed by any member of the public and were adequately supported by the SONAR. Accordingly, this Report

[85] *See, Manufactured Housing Institute, supra,* 347 N.W.2d at 244 (The Court instructs that the state courts are to restrict the review of agency rulemaking to a "narrow area of responsibility, lest [the court] substitute its judgment for that of the agency"); *see also, In the Matter of the Proposed Rules of the Minnesota Pollution Control Agency Governing Permits for Greenhouse Gas Emissions,* REPORT OF THE ADMINISTRATIVE LAW JUDGE, Minnesota Rules Chapters 7005, 7007 and 7011, OAH 8-2200-22910-1 at 20 (2012) (http://mn.gov/oah/images/2200-22910-GreenhouseGas-dismissal.pdf).

will not necessarily address each comment or rule part. Rather, the discussion that follows below focuses on those portions of the proposed rules as to which commentators prompted a genuine dispute as to the reasonableness of the Agency's regulatory choice or otherwise requires closer examination.

90. The Administrative Law Judge finds that the Department has demonstrated by an affirmative presentation of facts the need for and reasonableness of all rule provisions that are not specifically addressed in this Report.

91. Further, the Administrative Law Judge finds that all provisions that are not specifically addressed in this Report are authorized by statute and that there are no other defects that would bar the adoption of those rules.

A. Minn. R. 1309.0313 – Automatic Fire Sprinkler Systems

92. The key critique to the proposed rules is that the requirement that new homes 4,500 square feet, or larger, be installed with automated fire sprinklers, is arbitrary and capricious. Stakeholders made this point during the Advisory Committee process, during the later rulemaking hearing and in written comments on the proposed rule. As noted by the Builders in their Prehearing submission:

> The 4,500 square foot trigger is arbitrary. DLI has provided no basis and/or evidence for the 4,500 square foot trigger, and [the Builders'] independent research does not support it. Rather, it appears that DLI chose a number that seemed big and would affect only a subset of housing, perhaps in an effort to eventually apply the fire sprinkler mandate to all homes….[86]

93. The Administrative Law Judge finds the case of *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238 (Minn. 1984) instructive. In that case, the Commissioner of Health was tasked with setting, through rulemaking, the maximum level of ambient formaldehyde that would be permitted in new housing units. During the 1980s formaldehyde was used as a bonding agent in building materials, such as plywood and particle board, and those materials were commonly used in manufacturing mobile homes. The Minnesota Supreme Court concluded that a rule setting the level of ambient formaldehyde at 5 parts per million was arbitrary and capricious when there was "no explanation of how the conflicts and ambiguities in the evidence are resolved, no explanation of any assumptions made or the suppositions underlying such assumptions, and no articulation of the policy judgments."[87]

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[86] Ex. L, Pre-Hearing Memorandum, at 10; *see also,* Ex. M (Comments of Nathan Jones); Ex. N (Comments of Ray Austin); Ex. O (Comments of Lawrence M. Cramer); Ex. P (Comments of Jeff Parks); Ex. Q (Comments of Jeffrey M. Schoenwetter); Ex. R (Comments of Larry Kuperus); Ex. X (Resolution 2013-1210, City of Detroit Lakes); Ex. Y (Resolution 2013-46, City of Perham); *Comments of the City of Lakeville*.

[87] *See, Manufactured Housing Institute, supra,* at 246.

94. In this proceeding, by contrast, the Department explained how it resolved the conflicts in the rulemaking record, detailed the cost and performance assumptions it used and articulated the policy objectives it was pursuing through the proposed rule. As the Department explains in the SONAR, it selected a 4,500 square foot threshold for applicability of the sprinkler requirement for new single-family homes because these homes have larger quantities of combustible materials and overall sales prices that can bear the costs associated with installing sprinklers. The Department wrote:

> In reaching its balance between the benefits of the life-safety/property protections offered by automatic fire sprinkler systems and the costs of installing these systems in newly constructed one-family homes, the Department determined that larger homes have the same challenges for occupants and first responders as other two-family and townhouse structures, but that the relative cost of installing sprinkler systems in smaller homes may be too expensive. Therefore, the Department is proposing to amend IRC Rule 313.2 to exclude homes under 4,500 square feet from the automatic sprinkler requirement
>
> The Department chose the threshold of 4,500 square feet in response to the case made by the fire service that homes between 4,000 and 5,000 square feet and larger provide the greatest initial life-safety risk to the public.[88]

95. While it is undeniable that the proposed rule will result in real impacts on the prices of new homes, and the market conditions for those who build residential structures, the Department chose a compliance threshold that reflected contemporary construction practice, home prices and fire-prevention techniques. The proposed rule is needed and reasonable as those terms are used in the Administrative Procedure Act.

B. Minn. R. 1309.0703 – Exterior Covering

96. In comments on the proposed rule, Steven Pedracine, Executive Director of the Minnesota Lath and Plaster Bureau, urged the deletion of the reference to Table R702.1(3) in Part 1309.0703. Mr. Pedracine argues that a reference pertaining to the code requirements for interior plastering is inappropriate and confusing in a rule that relates to exterior plastering practice.[89]

97. The Department agrees and urges the deletion of the last sentence of proposed rule Part 1309.0703.[90]

98. The Agency's action revising the text is needed and reasonable and would not be a substantial change from the rule as originally proposed.

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[88] Ex. B, at 32 (SONAR).

[89] *Comments of Steven Pedracine*.

[90] DEPARTMENT'S POST-HEARING REBUTTAL COMMENTS, at 8-9.

Based upon the Findings of Fact and the contents of the rulemaking record, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Department has demonstrated its statutory authority to adopt the proposed rules.

2. The Notice of Hearing complied with Minn. R. 1400.2080, subp. 5.

3. The Department gave notice to interested persons in this matter.

4. The Department has fulfilled its additional notice requirements.

5. The Department has fulfilled the procedural requirements of Minn. Stat. §§ 14.05, subd. 1; 14.14, 14.15, subd. 3; and 14.50 (i) and (ii).

6. The Department has fulfilled the procedural requirements of law or rule.

7. The Department has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14 and 14.50.

8. The modification to the proposed rules suggested by the Department after publication of the Notice regarding the proposed rules in the *State Register,* are not substantially different from the proposed rules as originally proposed.[91]

9. As part of the public comment process, a number of stakeholders urged the Department to adopt other revisions to Chapter 1309. In each instance, the Agency's rationale in declining to make the requested revisions to its rules was well grounded in this record and reasonable.

10. A Finding or Conclusion of need and reasonableness with regard to any particular rule subsection does not preclude and should not discourage the Department from further modification of the proposed rules based upon this Report and an examination of the public comments, provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

[91] *See,* Minn. Stat. §§ 14.05, subd. 2, and 14.15, subd. 3.

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed amended rules be adopted.

Dated: February 7, 2014

s/Eric L. Lipman
ERIC L. LIPMAN
Administrative Law Judge

Reported: One Transcript, Kirby Kennedy & Associates

NOTICE

This Report must be available for review to all affected individuals upon request for at least five working days before the agency takes any further action on the rules. The agency may then adopt the final rules or modify or withdraw its proposed rule. If the agency makes any changes in the rule, it must submit the rule to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of a final rule, the agency must submit a copy of the Order Adopting Rules to the Chief Administrative Law Judge. After the rule's adoption, the OAH will file certified copies of the rules with the Secretary of State. At that time, the agency must give notice to all persons who requested to be informed when the rule is adopted and filed with the Secretary of State.